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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 MALCOLM LATHION GRAY,

11 *Petitioner,*

12 vs.
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14 JAMES G. COX, *et al.*,

15 *Respondents.*
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2:04-cv-01328-KJD-RJJ

ORDER

17 This reopened habeas matter under 28 U.S.C. § 2254 is before the Court on the
18 respondents' second motion (#25) to dismiss on the basis of untimeliness as well as on
19 petitioner's motion (#31) for leave to file a supplemental petition. Following review, the Court
20 concludes that an evidentiary hearing should be held on petitioner's claim of equitable tolling.

21 ***Background***

22 Petitioner Malcolm Lathion Gray seeks to set aside his conviction, following a jury
23 verdict, for second degree murder with use of a deadly weapon. He was sentenced to two
24 consecutive life sentences with the possibility of parole.

25 Petitioner's judgment of conviction was filed on December 14, 1995, and the Supreme
26 Court of Nevada affirmed on direct appeal on December 30, 1997. #10, Exhs. 2 & 4. Under
27 28 U.S.C. § 2244(d)(1)(A), the one-year limitation period began running on the day after the
28 time expired for seeking *certiorari* in the United States Supreme Court, *i.e.*, on or about March

1 30, 1998. Accordingly, unless otherwise tolled, the one-year period for bringing a federal
2 habeas action would expire one year later, on or about March 30, 1999.

3 Through counsel, petitioner filed a petition for state post-conviction relief on October
4 19, 1998, after approximately 203 days (nearly seven months) of the one-year limitation
5 period had run. On December 16, 1998, the state district court issued an order denying the
6 petition on written findings and conclusions. However, the state court clerk did not properly
7 serve notice of entry of the order denying the petition. Over two years later, on March 11,
8 2002, petitioner filed a *pro se* notice of appeal. The Supreme Court of Nevada held that the
9 notice of appeal was timely because of the state court clerk's failure to properly serve notice
10 of entry of the district court order. The appeal thereafter was pursued by counsel. On
11 September 3, 2003, the Supreme Court of Nevada affirmed the denial of the post-conviction
12 petition on the merits. #10, Exhs. 6-11. The remittitur issued on September 30, 2003. See
13 #3, Ex. 3.

14 Absent tolling, the one-year limitation period thus would expire 162 days later, *i.e.*, on
15 or about March 8, 2004. However, the federal petition was not mailed for filing until over six
16 months later, on or about September 21, 2004. Thus, absent tolling, the petition would be
17 subject to dismissal as time-barred under § 2244(d)(1).

18 In response to the Court's initial *sua sponte* inquiry into timeliness, petitioner
19 maintained that he could establish grounds for equitable tolling for the period from the
20 issuance of the remittitur on September 30, 2003, through July 12, 2004. According to
21 petitioner,¹ the remittitur and order of affirmance were sent to petitioner's post-conviction
22 appellate counsel rather than petitioner; and counsel did not advise petitioner of the Nevada
23 Supreme Court's order. On November 13, 2003, counsel sent petitioner his court files, but
24 there again was no mention of the Nevada Supreme Court order affirming the district court.
25 Petitioner was unable to make any further contact with counsel, and he wrote to the Nevada
26 Supreme Court to determine the status of his appeal. On July 12, 2004, he received a letter

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28 ¹The Court makes no credibility or factual findings as to the circumstances described by petitioner.

1 from the state supreme court clerk copying him with the Nevada Supreme Court order in
2 response to his inquiry. #3, at 4-5.

3 The Court pretermitted further *sua sponte* consideration of the timeliness issue but
4 without prejudice to the respondents' possible pursuit of the issue. #4.

5 In their first motion (#10) to dismiss, the respondents sought, *inter alia*, dismissal of the
6 petition with prejudice as untimely and, in the alternative, dismissal of the petition without
7 prejudice as a mixed petition including unexhausted claims.

8 On the timeliness issue, the sole contention advanced by respondents was that
9 petitioner was not entitled to equitable tolling because he did not demonstrate due diligence
10 between the time of the December 16, 1998, state district court order and his March 11, 2002,
11 notice of appeal. The Court rejected this contention on the following basis:

12 . . . [P]etitioner need not establish equitable tolling for this
13 period of time because the period was subject to statutory tolling.
14 Under Section 2244(d)(2), "[t]he time during which a properly filed
15 application for State post-conviction or other collateral review with
16 respect to the pertinent judgment or claim is pending shall not be
17 counted toward any period of limitation under this subsection." 28
18 U.S.C. § 2244(d)(2). As found by the Supreme Court of Nevada,
19 the final authority on Nevada state procedural law, the state
20 district court's order had not become final and non-appealable
21 due to the state court clerk's error. Gray's post-conviction
22 application thus remained pending during the entirety of the time
23 period in question and thus gave rise to statutory tolling under
24 Section 2244(d)(2). Accordingly, on the showing made by
25 respondents in the motion to dismiss, the Court is not persuaded
26 that the petition is time-barred under the AEDPA.

27 #16, at 4.

28 On the exhaustion issue, the petitioner conceded that Grounds Three through Twenty
were not exhausted. On October 14, 2005, following further proceedings, the matter was
stayed and administratively closed while petitioner returned to state court to exhaust the
unexhausted claims. Thereafter, on petitioner's motion, this matter was reopened on
November 8, 2006.

In the their second motion to dismiss, respondents contend that petitioner cannot
establish equitable tolling for the period after September 30, 2003. Petitioner additionally has
filed a motion for leave to file a supplemental petition, in which he seeks to raise new claims.

Governing Federal Limitation Law

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), in the context presented here, a federal habeas petition must be filed within one year after “the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). However, under § 2244(d)(2), “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2).

The AEDPA one-year statute of limitation may be equitably tolled “if *extraordinary* circumstances beyond the prisoner’s control make it impossible to file a petition on time.” *E.g., Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)(emphasis in original). The petitioner has the burden of proof on this “extraordinary exclusion.” 292 F.3d at 1065. He accordingly must demonstrate a causal relationship between the extraordinary circumstances and the lateness of his filing. *E.g., Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Equitable tolling is “unavailable in most cases;” and the threshold necessary to trigger equitable tolling is “very high, lest the exceptions swallow the rule.” *Miranda*, 292 F.3d at 1066.

Determining whether equitable tolling is warranted is a fact-specific inquiry, however; and, as a discretionary doctrine that turns on the facts and circumstances of each particular case, equitable tolling does not lend itself to bright-line rules. *Spitsyn*, 345 F.3d at 799 & 801. *See also Whalem/Hunt v. Early*, 233 F.3d 1146, 2248 (9th Cir. 2000)(*en banc*)(remanding for evidentiary hearing so that equitable tolling issue could be considered on an adequate record).

Discussion

The Court is not persuaded by the respondents’ arguments that, on the face of the record, petitioner cannot establish a basis for equitable tolling as a matter of law and that an evidentiary hearing therefore is unwarranted.

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1 Respondents first contend that there was no reason for post-conviction appellate
2 counsel to inform petitioner of the Nevada Supreme Court's order because Gray asserted in
3 his show cause response that he was proceeding *pro se*. Gray did indeed contend therein
4 that the Supreme Court of Nevada should have sent the order to him rather than counsel
5 because he initially filed the appeal *pro se*. Despite this contention by petitioner, the state
6 court record materials filed by respondents reflect that the post-conviction appeal ultimately
7 was pursued by the same counsel who represented Gray on the petition in the state district
8 court. The cc's on the Nevada Supreme Court's September 3, 2003, order reflect that the
9 order went to counsel, not petitioner. See #10, Exhs. 6-11. The critical point for Gray's
10 equitable tolling argument is that he maintains that he did not receive any notice – either from
11 counsel or the Nevada Supreme Court – that an order had been issued until he received
12 correspondence from the Supreme Court on July 12, 2004, responding to his inquiry.

13 Respondents nonetheless urge that Gray cannot rely upon any failure of counsel to
14 inform him of the order because Gray maintains that he should have received notice of the
15 order from the Nevada Supreme Court as a *pro se* litigant. Respondents assert that if Gray
16 was *pro se* as he maintains, then it was solely his duty to determine the status of the state
17 post-conviction appeal. The respondents' contention – in effect that Gray legally cannot rely
18 upon counsel's failure to inform him of the order because he maintains that the Nevada
19 Supreme Court instead should have sent the order to him because he was proceeding *pro*
20 *se* – is unpersuasive. If Gray is correct that he was proceeding *pro se*, then the state high
21 court sent the order to the wrong place; and any proposition that an attorney would have no
22 ethical obligation to inform a former client of such a misdirected order is highly problematic.
23 If, as the state court record suggests, Gray is not correct that he was proceeding *pro se* at the
24 time of the order, then his counsel allegedly failed to inform him of the order. Either way, the
25 critical point remains that Gray alleges that neither the court nor the attorney informed him of
26 the order prior to July 12, 2004.

27 Respondents next contend that petitioner "must demonstrate in what manner attorney
28 Amesbury's forty-four (44) day delay in relaying GRAY's file to him amounted to an

1 impediment external to GRAY's control." #25, at 10. This argument misconstrues petitioner's
2 claim of equitable tolling. Petitioner is not relying on counsel's delay in forwarding the file --
3 which he asserts did not contain the Nevada Supreme Court order -- until November 13,
4 2003. Petitioner instead is relying on counsel's failure to inform him, at that juncture or
5 thereafter, that the September 3, 2003, order had been issued, such that he did not learn of
6 the order until July 12, 2004.

7 Finally, respondents contend that "GRAY must demonstrate that, in fact, attorney
8 Amesbury did **not** affirmatively advise him of the outcome of the post-conviction appeal." #25,
9 at 10 (emphasis in original). Petitioner has consistently asserted herein that counsel did not
10 inform him of the September 3, 2003, order affirming the denial of post-conviction relief.

11 The Court accordingly will hold an evidentiary hearing on the equitable tolling issue,
12 a step which further requires that the Court appoint counsel for petitioner pursuant to Habeas
13 Rule 8(c).²

14 The Court's intention is to resolve the motion to dismiss as promptly as possible and
15 in all events by September 30, 2007. The Court accordingly, in the scheduling order issued
16 after the appearance of counsel for petitioner, may set a date for an evidentiary hearing on
17 the motion for a date as soon as sixty days following entry of the scheduling order. If counsel
18 will need more than sixty days between the scheduling order and the hearing, counsel shall
19 so advise in the notice of appearance. Counsel will be able to present argument on the
20 motion to dismiss in the pre-hearing memorandum.

21 The Court additionally will hold the petitioner's motion for leave to file a supplemental
22 petition under submission pending argument by appointed counsel. Counsel will have an
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24 ²The Court is not persuaded by the petitioner's argument that the Supreme Court of Nevada and this
25 Court have held that he is entitled to equitable tolling and that further inquiry is barred by *res judicata*. The
26 period in question on the present motion is the period after the issuance of the remittitur on September 30,
27 2003. The Supreme Court of Nevada did not address that period of time. This Court deferred further
28 consideration of this time period on its *sua sponte* inquiry without prejudice to the respondents' further pursuit
of the issue; and the Court's denial of the first motion to dismiss expressly was on the showing made, which
did not concern the period of time after September 30, 2003. Moreover, an interlocutory non-final order of
this Court does not provide a basis for a plea of *res judicata*.

1 opportunity in the pre-hearing memorandum to address both: (a) whether the claims in the
2 supplemental petition relate back under *Mayle v. Felix*, 545 U.S. 644, 125 S.Ct. 2562, 162
3 L.Ed.2d 582 (2005), if, *arguendo*, the original petition is not time-barred; and (b) whether the
4 claims tendered in the supplemental petition otherwise are timely if, *arguendo*, the original
5 petition is time-barred. The Court notes in the latter regard that petitioner asserts that the
6 supplemental claims all arise from the original criminal record.

7 IT THEREFORE IS ORDERED that an evidentiary hearing will be held in this matter
8 on the respondents' motion to dismiss on a date to be established by subsequent order and
9 that, pursuant to Rule 8(c) of the Rules Governing Section 2254 Cases and 18 U.S.C. §
10 3006A, counsel will be appointed for petitioner.

11 IT FURTHER IS ORDERED that the Federal Public Defender for the District of Nevada
12 shall have thirty (30) days to undertake direct representation of the petitioner or to indicate
13 to the Court its inability to represent the petitioner in these proceedings. If the Federal Public
14 Defender is unable to represent petitioner, the Court then shall appoint alternate counsel.
15 The counsel appointed will represent petitioner in all federal proceedings related to this
16 matter, including any appeals or *certiorari* proceedings, unless allowed to withdraw.

17 The Clerk of Court shall send a copy of this order to the Federal Public Defender and
18 to the CJA Coordinator for this Division.

19 DATED: April 10, 2007.

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KENT J. DAWSON
United States District Judge
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